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No. 08-1188

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

GERALD ROBINSON,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Court Of Appeals For The Sixth Appellate District

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court's precedent provide a functional definition of "actual prejudice" sufficient to answer the Due Process question of when a pre-prosecution delay claim is ripe for adjudication?

2. Should the holdings of *United States v. Marion*, 404 U.S. 307 (1971) and *United States v. Lovasco*, 431 U.S. 783 (1977) be altered in pre-prosecution delay cases to require that once a defendant has proved that the government's delay in filing charges has caused actual substantial prejudice to his case, that the court must then engage in a balancing test where the government's reasons for the delay are judged against the prejudice established by the defendant?

LIST OF PARTIES

The petitioner is Gerald Robinson, an inmate of the Ohio Department of Corrections.

The respondent is the State of Ohio, by and through the Lucas County Prosecutor's Office.

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INTRODUCTION

The thrust of Robinson's request for certiorari is his claim that the Ohio appellate court misapplied this Court's precedent requiring a finding of substantial actual prejudice and his disagreement with the second prong of the *Marion/Lovasco* test as it relates to preindictment delay. Additionally, he asks this court to reassess the lower court's factual findings in hopes that he will be able to meet the new standard that he asks this Court to adopt.

Robinson's petition raises three issues, none of which are worthy of this Court's review. In his first claim, he asks this Court to amend its previous holdings in *United States v. Lovasco*, 431 U.S. 783 (1977) and *United States v. Marion*, 404 U.S. 307 (1971), to create an all-encompassing definition for the phrase "actual prejudice." Such a rewrite of *Marion* and *Lovasco* is unwarranted since this Court has already ruled that "actual prejudice" must be determined on a case by case basis.

Robinson's second claim is that his rights under the Fifth and Sixth Amendments were violated because the deaths of certain potential witnesses denied him a meaningful opportunity to present a complete defense. The fact of the matter is that all the relevant statements of the unavailable witnesses were admitted into evidence from police reports of their interviews pursuant to Robinson's request. Whatever additional information petitioner claims he lacks from these people is a matter of pure speculation.

Finally, there is not a compelling reason for this Court to accept jurisdiction because this case is not of public or great general interest, and, even if Robinson's claims were granted, it would not change the result because Ohio law already embodies the balancing test he asks this Court to impose on the federal system.

In short, he simply disagrees with the standards established in *Marion* and *Lovasco* and asks this Court to change them. The Court should deny this petition.

COUNTERSTATEMENT

A. Robinson was convicted for the murder of a 71-year-old nun.

At approximately 8:20 a.m. on Saturday, April 5, 1980, the body of a seventy-one-year-old nun, Sister Margaret Ann Pahl, was found in the sacristy of the chapel in Mercy Hospital in Toledo, Ohio. The victim was last seen alive shortly before 7:00 a.m. that morning. Sister Pahl had been strangled and stabbed thirty-one times.

Sister Gordon entered the chapel on that Holy Saturday morning at about 7:30 a.m. At approximately 8:20 a.m., she went to the sacristy to use the telephone. There she discovered Sister Pahl's lifeless body.

The hospital chapel, which contained the sacristy where Sister Pahl's body was discovered, was continuously occupied by various nuns from approximately 7:30 a.m. that morning until Sister Pahl's body was discovered at 8:20 a.m.. Thus, the homicide occurred sometime between 7:00 a.m. and 7:30 a.m.. Petitioner has always claimed that he remained in his living quarters that morning until after Sister Pahl's body was discovered.

Toledo Police detectives arrived at the hospital within minutes and started their investigation. By the end of the first day, investigators had arrived at two conclusions. First, Sister Pahl had not interrupted a burglary or robbery. An inventory of the sacristy and the chapel revealed that nothing of value was missing. Additionally, Sister Pahl's purse was recovered from inside the sacristy.

Second, from the number of stab wounds, investigators inferred that the murderer was a very angry person who probably knew Sister Pahl, not a stranger. Moreover, in examining Sister Pahl's hands, there were no defensive wounds and the sacristy itself was in order with no signs of a struggle. These factors were indicative of the victim and the killer knowing one another.

On Sunday, April 6, 1980, detectives received information from the coroner's office that the blade of the weapon used to inflict the stab wounds was no more than one-half inch in width and at least three

inches in length. By Monday, April 7, 1980, investigators believed that, despite Sister Pahl being found in a state of near nudity, this crime was not sexually motivated. There was no evidence of rape.

On Wednesday, April 9, 1980, police interviewed Shirley Lucas, a housekeeper at Mercy Hospital, who told them that Sister Pahl, after a meeting with one of the two hospital priests, had been upset to the point of tears on Good Friday afternoon, April 4, 1980. When Sister Pahl gave Ms. Lucas the key to clean the convent, Sister told her that she was waiting to talk to "Father" about the changes he wanted to make for Easter Sunday Services. When Ms. Lucas returned the key after completing her cleaning duties, Sister Pahl was literally in tears, crying, "Why do they cheat God out of what belongs to Him?" This appeared to be a reaction to her just concluded talk with "Father."

The next morning, Sister Pahl was found dead in the chapel sacristy. While Ms. Lucas did not know which of the two priests Sister Pahl had been referring to, Assistant Chaplain Swiatecki was in the dining room at the time of the murder. At about 7:00 a.m., Leslie Kerner saw the petitioner by the chapel doors, and, at about 7:30 a.m., Grace Jones saw him walking out of the chapel, the exact time frame of the murder.

On April 12, 13 and 14, 1980, police interviewed Mercy Hospital employees who reported hearing, near the time of the murder, frantic footsteps down a

hallway leading from the chapel to a hallway which led to the apartment that the petitioner occupied.

After thirteen days of investigation, the police believed the evidence led to the petitioner as the principal suspect, and they asked him to appear at the Toledo Police Department for an interview on Friday, April 18, 1980. During this interview, petitioner claimed that the "true killer" came to him and admitted to the murder of Sister Pahl. When pressed for details and specifics, the petitioner acknowledged that this statement was a lie and that he had made the story up to protect himself.

Police then searched Robinson's residence and recovered an eight inch long sword-shaped letter opener with a blade approximately one-half inch wide. This letter opener was later found to have a fleck of material which tested presumptively positive for blood on three separate occasions.

Near the end of April 1980, Toledo Police presented their evidence to the Lucas County Prosecutor's Office for assessment. At that time, the Prosecutor's Office declined to present the matter to the grand jury because of insufficient evidence.

The Toledo Police Department continued to attempt to develop further evidence as to this homicide for years after April 1980. The case supervisor kept investigating the murder until he retired in the latter part of 1981. The lead detective also continued to investigate until he retired in 1998. In 1999, the Toledo Police Department submitted the murder

weapon to BCI for testing. While the letter opener again tested presumptively positive for the presence of blood, there was insufficient matter for a conclusive DNA result.

On December 2, 2003, Lucas County Cold Case Investigators received a letter in which a nun accused Robinson of sadomasochistic sexual abuse. Thereafter, on December 8, 2003, investigators interviewed the nun who had sent the letter as to her allegations of being raped by the petitioner. During the interview, the author of the letter advised the police that they should look for markings of an upside down cross on Sister Pahl's chest.

In the weeks that followed, investigators located and examined the physical evidence, interviewed original investigating officers, re-interviewed witnesses, and had physical evidence examined by specialized experts. Investigators did in fact discover the outline of an upside down cross on an altar cloth which had covered the victim's chest.

On April 23, 2004, investigators went to petitioner's home with the intention of interviewing him and conducting a search of his premises. During the questioning, the petitioner, for the first time, admitted that he never loaned the murder weapon to anyone, that he never had cut himself with it and that he had always locked his apartment door. Additionally, contrary to church practice, the petitioner claimed he never had a key to the sacristy because he had no reason to ever go into that room. Petitioner told

the investigators that he did not leave his apartment the morning of the murder or have any knowledge of the homicide until after learning of her death from a phone call. At the conclusion of the interview, the petitioner was arrested. On May 3, 2004, he was indicted for Aggravated Murder.

After the indictment, witnesses came forward with heretofore unknown information and reported seeing the petitioner at the doors to the chapel during the very time frame in which the murder occurred. This information conflicted with petitioner's claim in 1980 and his statement in April of 2004 that he had never left his residence the morning of the homicide until he received a phone call that informed him of Sister Pahl's death.

The object used to stab Sister Pahl was of a unique shape. It left the bloody impression of its shape on the altar cloth with which the murderer covered the victim. Among the bloody impressions on the altar cloth was a nickel-sized, blood-stained imprint of the United States Capitol Building in Washington D.C. Next to the hilt of the letter opener, which had been recovered from Robinson's residence, was a nickel-sized medallion depicting the United States Capitol Building in Washington, D.C. The petitioner admitted that he never loaned the letter opener out and that his room was always locked.

During the trial eight witnesses gave testimony proving that the letter opener confiscated from petitioner's living quarters was used in Sister Pahl's murder.

In June of 2004, a forensic anthropologist examined the victim's mandible and observed a small diamond-shaped defect. The letter opener in question had an unusual four-sided blade which tapered to a point that was described as diamond-shaped. The coroner inserted the tip of petitioner's letter opener into the defect in the mandible, and it fit "perfectly." The coroner opined that petitioner's letter opener " . . . caused these injuries or a weapon exactly like this caused these injuries."

Additionally, two of the only five certified blood stain pattern experts in the world testified as to blood transfer patterns found on the altar cloth which covered Sister Pahl. Both of these experts found blood stains on the altar cloth which matched the size, shape, and outline of the uniquely shaped letter opener. The experts stated, with specific regard to the medallion depicting the U.S. Capitol Building which left its imprint on the altar cloth, that for any other object to have left that stain " . . . it would have had to have been basically the same shape, the same size, and the same configuration."

In 1980, Robinson told the police that the "killer" had confessed to him about the murder. When pressed, however, the petitioner admitted to making this story up to prevent suspicion upon himself. In 2004, the petitioner told police that he could not have gotten into the locked sacristy because he had no key to the door. Two nuns testified that Robinson had his own key to the sacristy because his duties required

almost daily entry to prepare for and conduct communion and other services in the adjoining chapel.

In 2004, the petitioner told police he was dripping wet from his morning shower when he answered the telephone and received news of Sister Pahl's murder. In 1980, Robinson told police he had already finished dressing when he answered the telephone and received the news of Sister Pahl's death.

In 2004, the petitioner repeatedly described his actions after being informed of Sister Pahl's death as quickly dressing from his morning shower and running to the chapel. However, when confronted with witness statements reporting hearing the sounds of running footsteps in the petitioner's hallway that morning prior to Sister's body being discovered, Robinson changed his story to say he could not run because of the length of his cassock.

Because the petitioner's letter opener was determined to be the murder weapon, access to his personal residence became a factor. In 2004, Robinson tried to convince police that he kept his door unlocked and that anyone could have entered his residence. He later conceded the fact that he kept his apartment locked.

Robinson became a suspect in part because of the report of the sound of "frantic" running footsteps in the hallway, where only he lived, during the time frame of the murder. The petitioner lived on the same level of the hospital as the chapel, but in a different structure called the Professional Building. On April 5,

1980, hospital employee Wardell Langston was cleaning the floor under the balcony in the Professional Building. Shortly after 7:30 a.m., Mr. Langston heard the loud footsteps of someone running on the floor above him, coming down the hallway which connected to the chapel. The footsteps made their way around the balcony above him to another connecting hallway. The footsteps went down the other hallway, at the very end of which was the apartment where the petitioner had been living for six years. It was in this apartment that the petitioner claimed to have been at the time of Sister Pahl's murder.

Moreover, the manner, circumstances, and setting for the murder were unusual to say the least. Sister Pahl's half-naked body had been placed in an unnatural position. Her legs were straight and together, her arms were straight by her sides, and her head was straight and looking up. The victim had clearly been posed.

Further, some of the thirty-one stab wounds were not made in a random fashion. Nine of them were so evenly spaced that they formed the shape of a cross. Additionally, although there were no wounds or scratches to her forehead, there was a bloodstain on her forehead, between her eyes, apparently caused by the killer anointing her with the blood-covered letter opener.

In an effort to determine if any of these facts and other circumstances at the scene had any significance, investigators contacted Father Jeffrey Grob,

an associate vicar of the Archdiocese of Chicago. As a result of his education, background, and employment, he was familiar with the rituals of the Catholic Church as well as other rituals not of Catholic origin.

It was Father Grob's opinion that Sister Pahl's killer would have had to have been someone with specialized knowledge of Catholic ritual, such as a religious sister, a seminarian, or a priest. Father Grob opined that much of what occurred to the victim was an attempt to mock and degrade her. At the time of the homicide, everyone in the hospital with such specialized religious knowledge was accounted for except for one person. Father Swiatecki, the other priest, was observed to be in the cafeteria at the time of the homicide. All the nuns also had their whereabouts accounted for by other witnesses. Only the petitioner's whereabouts could not be verified.

Testimony established that the petitioner was less than content working for the nuns at Mercy Hospital. The petitioner had twice asked permission to become a military chaplain. These requests were denied. The petitioner, in his taped interview, referred to Mercy as "their (the nuns') hospital" and that he "just worked there." Sister Pahl was described as "a perfectionist"; one who could be "very, very strict"; "very stern"; "things had to be done a certain way"; if not "then she would come and tell you." Having been a previous CEO of a major hospital, she was not hesitant to state her opinion. She was also described as very serious about her religion. The

petitioner himself described Sister Pahl as having a dominant personality.

In the two years between indictment and trial, petitioner filed multiple motions. He did not however, file a motion claiming his case was prejudiced as a result of the time period between the date of the crime and the date of indictment. This allegation was raised for the first time on direct appeal.

Prior to commencement of trial, the State amended the indictment to the lesser included offense of Murder. During the trial the defense specifically moved to have all investigative reports deemed ancient documents pursuant to Ohio Evidence Rule 803.16. The trial court granted that request, thereby making every written report containing a witness statement admissible, whether the person was available for trial or not.

The jury convicted petitioner of the sole count of Murder.

B. The Ohio appellate court affirmed Robinson's conviction.

On direct review, the Ohio court of appeals upheld Robinson's conviction and sentence. The Ohio Supreme Court later denied Robinson's appeal. Of greatest relevance to this petition, the appellate court found that petitioner had not suffered substantial actual prejudice to his case as a result of the delay between the crime and indictment.

C. Misstatements of Fact.

In compliance with U.S. Supreme Court Rule 15.2, the respondent identifies the following misstatements of fact contained in petitioner's Writ of Certiorari.

Contrary to petitioner's assertion that Sister Gordon testified to impeach Margaret Warren's 1980 account about hearing footsteps in the vicinity of petitioner's apartment, the fact of the matter is that the defense introduced Ms. Warren's 1980 statement to impeach Sister Gordon's account. The state never impeached Ms. Warren's account. In fact, the state accepted her statement in closing argument and explained why it implicated petitioner. Ms. Warren's entire statement was introduced into evidence, and the jury heard all the evidence and arguments on this subject. Although petitioner bemoans the fact that she did not testify live, he has not indicated a single piece of additional information Ms. Warren could have provided on this subject.

In this filing, petitioner seeks to relitigate the facts by attempting to expand the time frame of the murder in order to reassert his trial defense that the second hospital priest, Father Swiatecki, was the killer. Petitioner neglects to mention why Father Swiatecki could not possibly be the killer.

Sister Gordon had breakfast with Father Swiatecki in the nuns' dining room the morning of the murder. Sister Gordon accompanied Father Swiatecki out of the dining room when they had

finished their breakfasts. As they parted company, Sister Gordon walked straight down the hall from the dining room directly into the chapel. A short while after she entered the chapel, Sister Gordon unlocked the sacristy door and found the victim's body. After she parted company with Father Swiatecki, it would have been impossible for him to gain access to the chapel or the sacristy without being seen or heard by Sister Gordon or one of the other nuns who had entered the chapel. *Robinson* ¶194.

In reconstructing the evidence of the trial, petitioner attempts to incorporate two unofficial statements made by coroner Dr. Fazekas into her "official findings" even though they were made, in one instance, prior to the actual autopsy, and in the second instance, before the petitioner's dagger-shaped letter opener was recovered.

Prior to the autopsy, Dr. Fazekas noted bruising to the back of the victim's neck and told a detective she may have been strangled from behind by a man with large hands.[1] Dr. Fazekas later abandoned this off-the-cuff opinion after the autopsy was conducted. Her official report said nothing of manual strangulation which proper medical protocol would have required. More importantly, after the autopsy, she told the police that the killer could have been a male or

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[1] She also told the detective that an official conclusion would have to await the autopsy.

female. *Robinson* ¶¶31, 32, 133, and 134. (Citation omitted; *see* Appendix A-1.)

A pair of scissors normally kept in the chapel could not be located after the murder. The nuns gave police a sample pair of scissors which were generally similar in appearance to the scissors which could not be located. Dr. Fazekas was shown this sample pair of scissors before the police recovered petitioner's dagger-shaped letter opener. When inspecting the sample scissors, which were of a different size and shape (shorter and narrower) than a pair of scissors believed to have been missing from the sacristy, Dr. Fazekas stated that scissors might have caused some of the wounds to the victim, but clearly not all thirty-one of them because the wounds on the victim's face appeared to have been made with a weapon sharper than the scissors. *Robinson* ¶21. Since the sample scissors were different in size and shape than the "missing scissors," their unavailability has no relevance. Moreover, nowhere in the record is either pair of scissors described as sharp. Petitioner asserts this out of whole-cloth.

Dr. Fazekas never opined that the *missing* scissors "very well could have been the murder weapon" "[B]ut she would not say with 100% certainty," as petitioner states, because Dr. Fazekas never had the "missing scissors" to examine. In fact, Dr. Fazekas said a pair of scissors could only have caused *some* of the punctures, as many of the wounds were too sharp edged. *Robinson* ¶136. Once petitioner's dagger-shaped letter opener was found and shown to Dr.

Fazekas, her opinion was clear: Robinson's letter opener was compatible with *each* of the wounds found in the body and could have been the weapon used. *Robinson* ¶¶22, 137.

Additionally, the petitioner argues that, had Dr. Fazekas testified, she would have offered testimony "that would have wholly negated a finding of guilt on the critical element of identity." Petition, p. 29. To the contrary, Dr. Fazekas' autopsy report, her statement made after the autopsy about a man or woman being capable of committing the crime, and those statements made after examining petitioner's letter opener did not negate petitioner's guilt nor were they in any way exculpatory. The State used them against petitioner in its case in chief. Regardless of that, all of her statements, official or otherwise, were brought before the jury and used by both parties as they deemed fit. Anything more she could have said is mere speculation.

Petitioner claims that Dr. Fazekas was the only person with first-hand knowledge of the critical identifying dimensions of the stab wound. Dr. Fazekas took notes and wrote an autopsy report which covered every one of the wounds in detail. Had she testified at trial, the overwhelming probability is that she would have had to have relied on her detailed notes and autopsy report. The notes and autopsy report were in evidence and went to the jury.

REASONS FOR DENYING THE WRIT

Robinson asks this Court to revisit its longstanding holdings in *United States v. Lovasco*, 431 U.S. 783 (1977) and, by extension, *United States v. Marion*, 404 U.S. 307 (1971), to enable him to set forth a claim that he failed to make in the trial court. In so doing, petitioner alleges that this Court has failed properly to articulate what constitutes "actual prejudice" in a pre-prosecution delay claim.

Robinson raised the argument that the delay between the commission of the offense and the bringing of the indictment resulted in substantial actual prejudice to his defense, not prior to trial, but for the first time on appeal. *Robinson* ¶¶91, 116, and 117. The Ohio appellate court, though noting this issue could be deemed to have been waived, reviewed it upon appeal and addressed it under the standards enunciated in *Lovasco* and *Marion*, *supra*, "not just because it [raised] a fundamental constitutional issue, but also because the issue raised forms the basis for appellant's claim of ineffective assistance of counsel." *Robinson* ¶117. Thus, this issue was afforded a full review upon appeal.

In challenging this Court's articulation of the two-part test in preindictment delay situations referenced in *Lovasco*, petitioner is actually asking this Court to revisit its holding in *Marion*, the decision in which this Court initially formulated its two-part test, not *Lovasco*. *Lovasco* stands for the proposition that prosecuting "a defendant following investigative

delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *Supra*, at 796.

Lovasco recognized that:

> investigative delay is fundamentally unlike delay undertaken by the Government solely to gain tactical advantage over the accused. . . . Rather than deviating from elementary standards of 'fair play and decency,' a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. *Id.*, at 795.

Investigative delay is precisely what occurred in the present case.

A. The court below followed correct procedure by exercising its judgment in a case specific manner.

In attacking *Lovasco*'s "actual prejudice" standard, petitioner in reality attacks the underpinnings of *Marion* in which this Court found that the speedy trial provisions of the Sixth Amendment did not apply until defendants, in some way, were officially accused, an event in *Marion* that occurred only upon indictment. Because the preindictment delay did not extend beyond the period of the applicable statute of limitation and because the defendants showed no actual prejudice resulting from the delay, this Court

held that defendants' due process claims were speculative and premature. This Court held:

> However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution. To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case. *Supra*, at 324-25.

Thus, *Marion* recognized that a rigid, all encompassing definition of actual prejudice could not possibly anticipate every variable imaginable in a criminal case. An inflexible definition could never possibly account for "the circumstances of each case." *Id.*

However, case authority has shaped the contours of this issue. The defendant bears the burden of proving actual prejudice flowing from the preindictment delay. *United States v. Gouveia*, 467 U.S. 180, 192 (1984) (citing *Lovasco, supra*, at 789-90); *United States v. Marion, supra*, 404 U.S. at 324. To prove actual prejudice, a defendant must specifically identify witnesses or documents lost during delay properly attributable to the government. *See Lovasco*, 431 U.S. at 788-90; *United States v. Dennis*, 625 F.2d 782, 794 (8th

Cir. 1980); *see also United States v. Mills*, 641 F.2d 785, 788 (9th Cir.), *cert. denied*, 454 U.S. 902 (1981); *United States v. Tousant*, 619 F.2d 810, 814 (9th Cir. 1980). Speculative or conclusory claims alleging "possible" prejudice as a result of the passage of time are insufficient. *Marion*, at 325-26. The defendant also must establish the substance of the testimony which would be offered by the missing witnesses and how the information is material to the accused's defense. *See United States v. Page*, 544 F.2d 982, 985 (8th Cir. 1976); *United States v. Quinn*, 540 F.2d 357, 361-62 (8th Cir. 1976); *United States v. Mays*, 549 F.2d 670, 679-80 (9th Cir. 1977). Additionally, the defendant must show that the missing testimony or information is not available through substitute sources. *See United States v. Tempesta*, 587 F.2d 931, 933-34 (8th Cir. 1978); *see also United States v. Cederquist*, 641 F.2d 1347, 1352-53 (9th Cir. 1981). The loss of or impairment of memories does not constitute actual prejudice for purposes of the due process clause. *See Marion*, 404 U.S. 322; *United States v. Purham*, 725 F.2d 450, 453 (8th Cir. 1984); *United States v. Taylor*, 603 F.2d 732, 735 (8th Cir.), *cert. denied*, 444 U.S. 982, 62 L.Ed. 2d 410, 100 S. Ct. 487 (1979). In sum, the defendant must demonstrate that the delay actually impaired his ability to present a meaningful defense. *United States v. Solomon*, 686 F.2d 863, 872 (11th Cir. 1982); *Cederquist*, 641 F.2d at 1351.

This same rationale can be found in this Court's other decisions in which "prejudice" is a factor. In *United States v. Frady*, 456 U.S. 152 (1982), this Court

dealt with the issue of what standard of review applied on a collateral challenge to a criminal conviction under 28 U.S.C. §2255 as it related to an alleged faulty jury instruction. This Court found that the proper standard for review was enunciated in *Davis v. United States*, 411 U.S. 233 (1973) and later confirmed and extended in *Francis v. Henderson*, 425 U.S. 536 (1976), and *Wainwright v. Sykes*, 433 U.S. 72 (1977). In part, the standard formulated requires a convicted defendant to show "actual prejudice" resulting from the errors of which he complains. In reaffirming this standard, this Court noted that the test "requires that the degree of prejudice resulting from the instruction error be evaluated in the total context of the events at trial." *Frady*, at 169.

This Court has consistently recognized that a rigid, inflexible rule which specifies the exact "quantum of proof necessary to meet that threshold," as petitioner demands, is impractical. Prejudice can only be properly evaluated in the total context of the events at trial, *Frady*, at 164, because it will always "involve a delicate judgment based on the circumstances of each case." *Marion*, at 324-25. The *Marion* standard is properly anticipatory of the variables encountered in actual cases and should be retained and not replaced as petitioner argues.

1. There is no requirement to engage in a "balancing test" under *United States v. Marion*.

Petitioner suggests that there is a variation among the federal circuit courts as to how the *Marion/Lovasco* standard is applied. He correctly articulates that most federal circuit courts interpret the *Marion/Lovasco* tests as requiring a defendant first to prove that the delay caused actual prejudice to his defense and then that the prosecution had an improper motive for the delay designed to gain a tactical advantage or some other improper purpose.

Petitioner argues that the test first articulated in *Marion* and later acknowledged in *Lovasco* is flawed and should be rejected for a new standard under which the focus is on the Government's reasons for the delay. Petitioner notes that two of the federal circuits take such an approach. Their first prong is still "actual prejudice." If established, their second prong requires the court to balance the prejudice suffered by the accused under the first prong against the Government's justification for the delay. Petitioner prefers this latter standard, and he asks this Court to adopt this minority position to meet with his point of view.

What petitioner fails to point out to this Court, however, is that the Ohio Supreme Court in *State v. Luck*, 15 Ohio St. 3d 150 (1989), adopted the very interpretation that petitioner seeks to have this Court impose upon the federal circuits. The appellate court applied that decision in this case and found

petitioner wanting. Nonetheless, petitioner is asking this Court to change its established standard even though the change, if adopted, would not alter the outcome of his case.

In *Luck*, the Supreme Court of Ohio adopted the "actual prejudice" prong of the *Lovasco* decision. *Id.*, at 157-58. Once the defendant makes a showing of actual prejudice, Ohio law then shifts the burden to the state to prove that the reasons for the delay were justified. *Id.*, at 158. The Court then weighs the prejudice suffered by the defendant against the state's reasons for the delay to determine whether the delay resulted in a due process violation. *Id.*, at 154. Thus, Ohio courts employ, and the court of appeals in this case utilized, the very standard which petitioner seeks to have this Court mandate as the law of the land.

This Court recognized in *Marion* that "possible prejudice is inherent in any delay, however short; it may also weaken the Government's case." *Id.*, at 322 (footnote omitted). Both *Marion* and *Lovasco* emphasized that "the primary" protection against preindictment delay was the statute of limitations, and that the due process clause had but "a limited role to play." *Lovasco*, at 789. The only due process violation specifically recognized occurred when the delay not only "caused substantial prejudice . . . " but also " . . . was an intentional device to gain tactical advantage." *Marion*, at 324. *Marion* reversed the dismissal for preindictment delay stating, " . . . there is no showing that the Government intentionally delayed to gain

some tactical advantage over appellees or to harass them." *Id.*, at 325.

Lovasco rejects the notion that prejudice from preindictment delay is a sufficient, rather than merely a necessary, condition for relief. *Id.*, at 790, 795-96. It likewise rejected the contention that the due process clause proscribes delay beyond the time the prosecution has assembled sufficient evidence to prove guilt beyond a reasonable doubt. *Id.*, at 792-95. *Lovasco* refuses to proscribe investigative delay *because* such "delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused.'" *Lovasco*, at 795. Moreover, *Lovasco*, rather than remanding for reconsideration in light of its principles, flatly held that the dismissal of the indictment was error *despite* the findings of both the district court and the Court of Appeals that the delay not only caused actual prejudice to the accused but was also "'unjustified, unnecessary, and unreasonable.'" *Lovasco*, at 787. Indeed, both *Lovasco* and *Marion* indicate the undesirability of attempting to make such determinations. Finally, neither *Marion* nor *Lovasco* mentions any "balancing" or "weighing" of the extent of the prejudice against the relative merit of the reasons for the delay. The closest thing to a reference to balancing is *Marion*'s statement that limitations statutes "represent legislative assessments of *relative interests* of the State and the defendant." *Id.*, at 464. (emphasis added.)

This Court has reaffirmed this standard in *United States v. Gouveia*, 467 U.S. 180, 192 (1984), wherein this Court stated:

> But applicable statutes of limitations protect against the prosecution's bringing stale criminal charges against any defendant, *United States v. Lovasco*, *supra*, at 788-789; *United States v. Marion*, *supra*, at 322, and, beyond that protection, the *Fifth Amendment* requires the dismissal of an indictment, even if it is brought within the statute of limitations, *if* the defendant can prove that *the Government's delay* in bringing the indictment *was a deliberate device to gain an advantage over* him *and* that it caused him actual prejudice in presenting his defense. *United States v. Lovasco*, *supra*, 431 U.S. at 789-790, *United States v. Marion*, *supra*, 404 U.S. at 324. (emphasis added.)

Similarly, in *Arizona v. Youngblood*, 488 U.S. 51 (1988), this Court, in support of its holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law," stated, at 57, that

> Our decisions in related areas have stressed the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government. In *United States v. Marion* (citation omitted), we said that '[n]o actual prejudice to the

> conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them.' *Id.* at 325, 92 S. Ct. at 466; *see also, United States v. Lovasco* (citation omitted).

Moreover, in *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983), this Court, in rejecting the Government's argument that the *Lovasco* standard should apply in a civil forfeiture situation, described the test to be employed for due process challenges to delay in instituting criminal prosecutions as follows:

> As articulated in *United States v. Lovasco* (citations omitted), such claims can prevail only upon showing that the Government delayed in seeking an indictment in a deliberate attempt to gain an unfair tactical advantage over the defendant or in reckless disregard of its probable prejudicial impact upon the defendant's ability to defend against the charges. *Id.*, at 563.

Thus, this Court has consistently held that the focus must be on the Government's intent when it comes to foreclosing the Government from its day in court in its efforts to prosecute crime.[2]

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[2] *See, e.g., United States v. Soto-Beniquez*, 356 F.3d 1, 25 (1st Cir. 2003) (discovery violations and improper statements did

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not violate due process because defendant unable to show pre-indictment delay caused actual, substantial prejudice and that prosecution orchestrated delay to gain tactical advantage); *Denis v. Upstate Corr. Facility*, 361 F.3d 759, 760 (2d Cir. 2004) (claim that 77-month delay in obtaining indictment violated due process not valid because petitioner failed to show actual prejudice or deliberate delay to secure tactical advantage); *United States v. Beckett*, 208 F.3d 140, 151 (3d Cir. 2000) (claim that 6-month pre-indictment delay violated due process not valid because defendant unable to show prejudice or that prosecution orchestrated delay to gain tactical advantage); *Jones v. Angelone*, 94 F.3d 900, 911 (4th Cir. 1996) (claim that 10-year pre-indictment delay violated due process not valid because defendant suffered no actual prejudice and delay attributable to defendant's efforts to avoid extradition); *United States v. Avants*, 367 F.3d 433, 441-42 (5th Cir. 2004) (no due process violation surrounding conviction for aiding and abetting premeditated murder of victim in national forest because defendant did not show intentional delay for purpose of gaining tactical advantage or that delay caused actual, substantial prejudice); *Monzo v. Edwards*, 281 F.3d 568, 582 (6th Cir. 2002) (claim that 6-year pre-indictment delay violated due process not valid because defendant did not show delay was to gain tactical advantage or that defendant could have been identified sooner); *United States v. McMutuary*, 217 F.3d 477, 481-82 (7th Cir. 2000) (claim that nearly 5-year pre-indictment delay violated due process not valid because defendant failed to show actual substantial prejudice; defendant must allege more than mere speculative harm); *United States v. Grap*, 368 F.3d 824, 829 (8th Cir. 2004) (pre-indictment delay did not violate defendant's due process rights because he was not substantially prejudiced); *United States v. Gregory*, 322 F.3d 1157, 1165 (9th Cir. 2003) (claim that 17-month delay in bringing superseding indictment violated due process not valid because defendant failed to show actual prejudice); *United States v. Wood*, 207 F.3d 1222, 1235 (10th Cir. 2000) (claim that 4-year pre-indictment delay violated due process not valid because defendant failed to show definite rather than speculative prejudice).

There are multiple considerations which strongly militate against utilizing a "balancing test," as petitioner advocates, to determine whether prejudicial preindictment delay violates due process and in favor of requiring that the delay has been intentionally caused by the prosecution to gain a tactical advantage over the defendant or for some other bad faith purpose. Why a "balancing test," such as petitioner proposes, is unworkable was analyzed and rejected by the Fifth Circuit Court of Appeals in *United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996).

The court, in *Crouch, supra,* noted that a balancing test, such as proposed by petitioner, purports to weigh or balance the extent or degree of the actual prejudice against the extent to which the government's "good faith reasons" for the delay deviate from what the court believes to be appropriate. The Fifth Circuit Court recognized that:

> what this test seeks to do is to compare the incomparable. The items to be placed on either side of the balance (imprecise in themselves) are wholly different from each other and have no possible common denominator that would allow determination of which 'weighs' the most. Not only is there no scale or conversion table to tell us whether eighty percent of minimally adequate prosecutorial and investigative staffing is outweighed by a low-medium amount of actual prejudice, there are no recognized general standards or principles to aid us in making that determination and virtually no

body of precedent or historic practice to look to for guidance. Inevitably, then, a 'length of the Chancellor's foot' sort of resolution will ensue and judges will necessarily define due process in each such weighing by their own 'personal and private notions of fairness,' contrary to the admonition of *Lovasco*. *Supra*, at 1512.

The court went on to state:

Apart from the above difficulty, grounding a due process violation on the basis of good faith but inadequate, ineffective, or insufficient governmental personnel or management leading to preindictment delay runs counter to two basic constitutional principles. In the first place, 'historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property,' *Daniels v. Williams* (citation omitted), and hence 'the Due Process Clause . . . is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property.' *Davidson v. Cannon* (citation omitted). Contrary to these principles, however, [a balancing] test would find a due process violation where the government acted in good faith and did not deliberately seek to prejudice the party ultimately accused. *Supra*, at 1512-13.

Crouch also noted:

Finally, serious separation of powers concerns are implicated. Here, for example, the

panel concluded that the reasons for the delay 'lack of manpower and the low priority which this investigation was assigned' were 'insufficient to outweigh the actual prejudice to Crouch and Frye.' *Crouch*, at 483. Finding these reasons "insufficient" is in substance determining that greater manpower *should* generally have been allocated to investigation and prosecution in that jurisdiction, and that a higher priority *should* have been assigned to this particular investigation. Yet those decisions are ones essentially committed to the legislative and executive branches, and the case for judicial second guessing is particularly weak where it is directed at preindictment conduct and is supported not by any specific constitutional guaranty or by any long-established tradition of judicial oversight, but only by the general contours of the due process clause. *Supra*, at 1513.

Therefore,

[i]f all the manpower that could reasonably be expected has been furnished and the highest reasonably appropriate priority has been assigned to the matter in question, but a due process violation has nevertheless been found despite the delay's being caused only by the insufficient manpower and the relative priority assigned to the matter, then the due process violation must necessarily rest on prejudice alone, contrary to *Lovasco*. *Supra*, at note 19.

The Fifth Circuit Court of Appeals rejected a balancing test approach and held that for preindictment delay to violate the due process clause it must not only cause the accused substantial, actual prejudice, but the delay must also have been intentionally undertaken by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other impermissible, bad faith purpose.

In the present case, the record was not fully developed to explain the State of Ohio's reasons for the delay in bringing charges. This is because petitioner failed to raise this claim prior to trial and as such the State of Ohio was precluded from having the opportunity to create a complete record as to its actions through the years. However, enough facts can be gleaned from the record to clearly show that the delay was not a tactical construct designed to gain an unfair advantage at trial, but rather an investigative delay occasioned by the circumstances of the case. (*See* Respondent's Counterstatement p. 5).

Lovasco clearly established the principle that "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *Id.*, at 796. This principle was followed in petitioner's case.

2. Petitioner failed to establish prejudice.

Under either version, the *Marion/Lovasco* test or the petitioner's newly proposed standard, it remains the defendant's burden to establish the first prong,

that is, that the delay caused substantial actual prejudice to the defense. In the present case, the state appellate court, in describing this first prong stated:

> If the defendant fails to meet his burden of establishing prejudice – that is, if the court determines that the missing evidence would not have significantly minimized or eliminated the impact of the state's evidence – the inquiry ends and the matter is concluded. *Robinson* ¶123.

In assessing the first prong of the test, the Ohio appellate court specifically cited to *Lovasco* noting, "To prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse in time." *Lovasco*, 431 U.S. at 796.[3]

The Ohio Sixth District Court of Appeals, after a thorough 17 page review of petitioner's claims as to any alleged prejudice found:

> . . . the evidence of appellant's guilt – including evidence showing that he was the person who committed the murder and that the instrument that he used to commit the murder was his sword-shaped letter opener –

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[3] In making this determination, the Ohio appellate court noted that some prejudice to a defendant occurring from evidence lost over the years does not deprive him of due process; rather, in order for a defendant to be deprived of due process, the prejudice must be substantial. *Robinson* ¶ 125, citing *State v. Walls*, 96 Ohio St. 3d 437 (2002).

> was very strong. And, in light of that evidence, we are compelled to conclude that any small amount of prejudice that may **arguably** have been suffered by appellant as the result of the missing evidence **(and based upon our analysis above, we do not find that there was any such prejudice)** did not constitute 'actual prejudice' . . . Because appellant has failed to meet his burden of establishing actual prejudice, we need not consider whether there was any justifiable reason for the delay in the prosecution of this case. *Robinson, supra*, at ¶¶161, 162. (emphasis added.)

As such, in this case, petitioner failed to meet his initial burden of proof of establishing substantial actual prejudice regardless of whether the longstanding *Marion/Lovasco* standard is applied, or if his newly proposed standard is applied. Therefore, the outcome of this case remains the same whether this Court ultimately finds in favor of the petitioner or the respondent.

Recognizing this reality, petitioner asks this Court to revisit the factual determinations made by the court below to serve as a predicate for this Court to justify establishing a new standard of review relative to the holdings of *Marion* and *Lovasco*, *supra*.[4]

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[4] State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process. In

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B. The appellate court's opinion does not conflict with the Fifth or Sixth Amendment.

Petitioner argues that the delay in this case prevented him from presenting a meaningful and complete defense. The reality is that the petitioner was, at most, prevented from offering a speculative defense in his case. This does not constitute a violation of his Due Process rights or his right to confrontation under the Sixth Amendment.

Petitioner cites this Court's ruling in *Holmes v. South Carolina*, 547 U.S. 319 (2006), which held that state evidentiary rules which arbitrarily excluded evidence of third-party guilt violated a criminal defendant's right to have "a meaningful opportunity to present a complete defense." *Holmes, supra*, at 331.

However, this Court in *Holmes*, *supra*, recognized that well-established rules of evidence may properly exclude probative evidence in many circumstances. This Court noted that while

> [t]he accused may introduce any legal evidence tending to prove that another person may have committed the crime with which he is charged. . . . [Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for

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fact, state courts often occupy a superior vantage point from which to evaluate the effect of trial error. *Brecht v. Abrahamson*, 507 U.S. 619, 636 (1993).

> example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial. *Supra,* at 327.

Petitioner's claims do not amount to actual prejudice. In analyzing his claims the Ohio appellate court framed the issue as follows: "To establish a claim of prejudice due to the unavailability of witnesses who would be able to testify on a defendant's behalf, the defendant must identify the missing witnesses and the subject matter of their testimony, and, further, must explain how the missing evidence has impaired his defense." *Robinson* ¶126.

In reviewing petitioner's claim of prejudice regarding the death of the original deputy coroner, the sample scissors, and the stab wounds, the appellate court provided a detailed analysis of why these claims failed to establish substantial actual prejudice. *See Robinson* ¶¶126-142. The appellate court also dealt with his claim of prejudice as to the death of his fall guy, Father Swiatecki, as well as Margaret Warren. ¶51-158. The appellate court, over the span of nineteen pages, consisting of forty-six paragraphs analyzing petitioner's claims, consistently found that they were "speculative, at best" ¶141; just "speculation" ¶144; and only "speculative, at best" ¶157.

As such, the lower court's decision did not deprive petitioner of "a meaningful opportunity to present a complete defense." *Holmes, supra,* at 331. Every

statement made by a witness that counsel sought to introduce into evidence went before the jury as a result of the ancient document ruling that petitioner obtained.

The only matters the jury did not hear from the deceased witnesses were what petitioner hopes he might have stumbled across if he had had the opportunity to examine these witnesses. This is the very essence of "speculative" evidence which *Holmes* recognized as properly excludable. "Such rules [excluding speculative evidence] are widely accepted, and neither petitioner nor his *amici* challenge them here." *Holmes, supra*, at 327.

This argument is clearly flawed and inconsistent with *Holmes*, *supra*, and should be rejected.

C. This case is not of public or great general interest.

Ultimately, Robinson is asking this court to reassess the factual determinations made by the State appellate court. These claims are simply not of public or great general interest.

CONCLUSION

For these reasons, the Court should deny the petition.

Respectfully submitted,

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